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IN THE

Supreme Court of the United States

OCTOBER TERM 1958

No. 166

ROBERT JOHN GROCHOWIAK
Appellant

v.

COMMONWEALTH OF PENNSYLVANIA
Appellee

PETITION FOR REHEARING OF ORDER DISMISSING APPEAL

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Appellee

The Honorable Court is respectfully urged to reconsider its order of October 13, 1958, dismissing the appeal for want of a substantial federal question, for the following reasons:

1. The dismissal of this appeal leaves in grave jeopardy the constitutional guaranty of free speech and free press as applied to the dissemination of news, information and entertainment via motion pictures and in practical effect affirms the position of the lower courts that the state may arbitrarily prohibit such dissemination.

2. The dismissal of this appeal creates a sharp conflict between the decision of the Superior Court of Pennsylvania and the long series of decisions of your Honorable Court strictly limiting encroachments on the First Amendment Freedoms.

3. Recurrence of a question has been recognized by your Honorable Court as grounds for consideration on the merits, *Teamsters Union v. Vogt, Inc.* 354 U. S. 284; and subsequent to the docketing of this appeal the cases of *Ullner v. Ohio,* No. 426 Oct. Term 1958 and *Kidd and Mills v. Ohio,* No. 465, Oct. Term 1958 were docketed in this Court. These cases, like this appeal, raise the question of the constitutionality of a Sunday closing statute on grounds of unequal protection of the law, deprivation of property without due process of law and religious legislation.

BACKGROUND OF THIS CASE

Appellant in his capacity as manager of the State Line Drive-In Theatre, located in Antrim Township, Franklin County, Penna., exhibited a newsreel and certain motion pictures on Sunday evening June 24, 1956. No evidence was introduced or contention made that the newsreel or motion pictures were obscene, offensive or that they had any adverse effect on the peace and good order of the community, and it was established that one of the motion pictures was available for exhibition by television in the same area and at the same hour as its exhibition by appellant.

The Sunday exhibition had not been approved by the electorate of Antrim Township and the appellant was prosecuted and found guilty of violation of Section 2 of the Act of July 2, 1935, P. L. 599, 4 Pa. Stat. Ann. 60 (Supp. 1957). In subsequent appeals to the Court of Quarter Sessions of Franklin County, Penna. and the Superior Court of Pennsylvania, appellant contended the Act here in question was repugnant to the Constitution of the United States and the decisions of those courts were in favor of the validity of the statute. The Supreme Court of Pennsylvania refused appellant's petition for allowance of an appeal.

Your Honorable Court on October 13, 1958, dismissed this appeal for want of a substantial federal question.

ARGUMENT

I

THIS APPEAL SHOULD BE ALLOWED TO REESTABLISH FREEDOM OF SPEECH AND THE PRESS AS FUNDAMENTAL RIGHTS

This appeal concerns not only the liberty and property of the individual appellant but also the status of the First Amendment freedom of speech and the press as applied to the exhibition of motion pictures as a media for the dissemination of information. If the door to the constitutional prohibition, restriction or regulation of one of the media for the dissemination of information is allowed to remain open, it is respectfully submitted a first step is being taken toward the day when those media may be entirely controlled.

The chief thrust of the appellee has been along the lines that the Act here in question makes no effort to affect form or content of expression, but simply prohibits the expression and further the electorate may remove the prohibition. This is hardly a sufficient answer to the definitive pronouncements of your Honorable Court that "expression by means of motion pictures is included within the free speech and free press guaranty . . ." *Burstyn v. Wilson,* 343 U. S. 495, 502 (1952); "One's right to . . . free speech, a free press . . . may not be submitted to a vote; they depend on the outcome of no election.", *West Virginia State Board of Education v. Burnette* et al 319 U. S. 624, 683 (1943); "Freedom to distribute information to every citizen wherever he desires to receive it . . . must be fully preserved," *Martin v. Struthers,* 319 U. S. 141, 146

(1943); "The power of a state to abridge freedom of speech . . . is the exception rather than the rule . . .", *Herndon v. Lowery* 301 U. S. 242, 258 (1937); "The freedoms guaranteed by the First Amendment . . . occupy a preferred position under our law", *Thomas v. Collins,* 323 U. S. 516 (1944).

As recently as *Speiser et al v. Randall* et al Nos. 483 and 484 and *National Association for the Advancement of Colored People v. Alabama* No. 91, both decided June 30 ,1958, this court alluded to the constitutional guarantees of free speech and free press and free association as "these indispensable liberties" and further noted the withdrawal of mailing privileges or the opportunity to invoke the facilities of the National Labor Relations Board and the withholding of tax exemptions constituted a deprivation of free speech and press. The consistency of this court's reasoning through these most recent decisions requires rejection of the alien philosophy sustained by the courts below and at the very least plenary consideration of the application of a Sunday closing statute to these fundamental freedoms.

II

BY REASON OF RECURRENCE OF IMPORTANT CIVIL RIGHTS QUESTIONS HERE INVOLVED THIS APPEAL SHOULD BE ALLOWED

In the past two years three cases have been brought up to this Court on various aspects of Sunday closing laws: *Gundaker Central Motors v. Gassert*, 354 U. S. 933 (1956); *Taylor v. Pine Bluff*, 352 U. S. 894 (1956); *Hickenbotham v. Williams*, 353 U. S. 961 (1957). In each instance this Court has refused to hear the questions raised. In the present term of Court in addition to this appeal two other appeals have been docketed likewise raising the issue of the constitutionality of Sunday closing laws by reason of the constitutional requirements of due process and equal protection of the law and the prohibition against religious legislation: *Ullner v. Ohio* No. 426, October Term 1958, *Kidd et al v. Ohio* No. 465 October Term 1958.

The issues here raised involving Sunday closing laws have not been reviewed by this Court since *Petit v. Minnesota*, 177 U. S. 164 (1900) and at that time the Fourteenth Amendment had not yet been interpreted to apply the fundamental freedoms of the First Amendment to the states.

In *Irvine v. Calif.*, 347 U. S. 128, 147 (1953) this Court held, "Since due process is not a mechanical yardstick, it does not afford mechanical answers. In applying the due process clause judicial judgment is involved in an empiric process, in this sense, that results are never predetermined or mechanically ascertainable." The rash of cases above referred to evidences a recognition on the part of the citizenry that

the substantive constitutional law of this country has kept pace with an expanding and motorized economy and an awakened and enlightened interest in the rights of fellow citizens not sharing the same religious or political beliefs or the same color of skin.

In *International Brotherhood of Teamsters v. Vogt, Inc.* 354 U. S. 284, 287 (1957) this court held, "In view of the recurrence of the question, we thought it advisable to grant certiorari and to restate the principles governing this type of case." The issues here involved concerning individual rights will remain an area of confusion breeding further litigation until such time as the Supreme Court of the United States resolves the conflicting claims of right.

CONCLUSION

For the foregoing reasons we respectfully submit that this Court's order dismissing the appeal should be reconsidered and the appeal allowed to effect a complete determination of the issues in this case.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing Petition for Rehearing is presented in good faith and not for delay.

JOHN W. KELLER
Of Counsel